

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION



January 7, 2004

United Transportation Union, Illinois State Legislative Board.

Petition for rulemaking to require safe walkways for railroad employees in the state.

T03-0015

TO ALL PARTIES OF RECORD:

**ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

Attached is a copy of the Administrative Law Judge's Proposed Order in the above referenced matter.

The Administrative Law Judge's Proposed Order is being sent to you pursuant to the Commission's Rules of Practice (83 Ill. Adm. Code 200). Your case is a "contested case" or "licensing case" as defined in Section 200.40 of the Rules and, therefore, the Hearing examiner is required under Section 200.820 to issue a Proposed Order to all parties.

Under Section 200.830 of the Rules, exceptions to the Proposed Order and replies thereto may be filed by the parties within the time periods established by the rules of such other times as fixed by the hearing examiner. The times for filing exceptions and replies are fixed at ten days and five days, respectively.

Entered:

*June B. Tate*

June B. Tate  
Administrative Law Judge  
Review & Examination Program

JBT:rsc  
Railroad Staff: Ms. Collins

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

United Transportation Union	:	
Illinois State Legislative Board,	:	
Petitioner	:	
	:	T03-0015
Petition for rulemaking to require safe	:	
walkways for railroad employees in the	:	
state.	:	

ORDER

By the Commission:

On February 18, 2003, the United Transportation Union – Illinois State Legislative Board ("Petitioner") filed the above-captioned verified petition with the Illinois Commerce Commission ("Commission").

Pursuant to proper legal notice, the matter came on for hearing on April 22, 2003 before a duly authorized Administrative Law Judge ("ALJ") of the Commission. At the hearing, Union Pacific Railroad Company, Illinois Central Railroad Company, Wisconsin Central Ltd., Grand Trunk Western Railroad Incorporated, Chicago Central & Pacific Railroad Company, Chicago Rail Link, Ltd., Norfolk Southern Railway Company, The Burlington Northern and Santa Fe Corporation, CSX Transportation, Inc. and Kansas City Southern were represented by counsel. Counsel for Petitioner and the Special Assistant Attorney General ("SAAG") also appeared. At the request of the parties, off-the-record discussion among them was conducted by the SAAG in hopes of reaching consensus. Following discussion, the matter was continued to June 24, 2003.

On August 28, 2003, Manufacturers Railway Company filed with the Commission a request for removal from the list of interested parties for the reason that it owns no railroad track or railroad walkways in the State of Illinois.

At the June 24, 2003 hearing, the parties named above appeared with the exception of The Burlington Northern and Santa Fe Corporation and Kansas City Southern. Counsel for Petitioner stated that minor issues had been resolved but that the major two issues of the size of ballast and standards for the walkways remained unresolved. Discussion continued and the matter was continued from time to time. The Commission was informed that further discussion was deemed to be futile and the parties prepared for prove-up of their cases on the continuance date of October 2, 2003.

On July 14, 2003, Union Pacific Railroad Company ("Union Pacific") and The Burlington Northern and Santa Fe Railway Company ("BNSF") filed a Response to the Petition for Rulemaking to Require Safe Walkways for Railroad Employees in the State. Attached as Exhibit A were proposed walkway rules.

On July 15, 2003, CSX Transportation, Inc. ("CSXT") filed its Response to United Transportation Union's Petition for a Rulemaking to Require Safe Walkways for Railroad Employees in the State. Attached as Exhibit A were proposed walkway rules which were similar to those filed by Union Pacific and BNSF.

At the hearing on October 2, 2003, appearances were entered by counsel for Wisconsin Central Ltd., Chicago Rail Link, Ltd., Chicago Central & Pacific Railroad Company, Grand Trunk Western Railroad, Inc., Illinois Central Railroad Company, Norfolk Southern Railway Company, and CSX Transportation, Inc. and Petitioner. In addition to the SAAG, Michael Stead, Director of the Railroad Safety Section of the Transportation Bureau appeared for Staff of the Commission. At the conclusion of the hearing on October 2, 2003, the record was marked "Heard and Taken."

On September 30, 2003, a Joint Response to United Transportation Union's Petition for a Rulemaking Covering Walkways was filed by Norfolk Southern Railway Company; Illinois Central Railroad Company; Grand Trunk Western Railroad Incorporated; Chicago, Central & Pacific Railroad Company; Wisconsin Central Ltd; and Wisconsin Chicago Link Ltd. ("Joint Respondents") in which Joint Respondents claimed that the proposed rules were preempted by Federal Law and that the Commission has no power to adopt the proposed rules.

Petitioner and Joint Respondents filed post-hearing briefs on October 20, 2003 and November 3, 2003, respectively.

#### **Petitioner's Direct Case**

Petitioner's first witness, Joseph C. Szabo, testified that he is state legislative director for the United Transportation Union, primarily responsible for the health and safety of the union membership. Mr. Szabo also processes safety complaints before regulatory agencies. Mr. Szabo explained that ballast is the ground cover in railyards. It is composed of rocks of different sizes. Mr. Szabo testified that the railroads were using oversized ballast and rocks in the railyards which is unsuitable for walking. In addition, there is standing water in the yards and debris in the walkways creating safety hazards for the switchmen, enginemen, and conductors. According to Railroad Safety Statistics Annual Report, Illinois led the nation in total accidents and injuries and is consistently the worst or second worst in this regard. Illinois experienced the most deaths of

railroad employees. Mr. Szabo sponsored an exhibit, entered into evidence as Exhibit 19 in which a medical doctor specializing in ergonomic engineering measured the damage and difficulties of walking on large ballast and concluded that walking on large ballast was unsafe.

Rules for walkways proposed by Petitioner require smaller ballast and a downward slope from the track which does not exceed one inch of slope for every eight inches in length ("1:8 ratio") and the walkway is to be two feet (2') wide.

Remote control devices are being used in all major railyards in Canada. They are used by switchmen, on the ground, to direct the placement of locomotives without the necessity of boarding the locomotive to manually direct it. It is the opinion of Mr. Szabo that remote control of locomotives will require more walking and possibly result in more injuries.

On cross examination, Mr. Szabo testified that industry standards for ballast gradations are set by the American Railroad Engineering and Maintenance of Way Association ("AREMA"). AREMA is composed of engineers, railroad workers, consulting engineers, and material men who recommend practices and materials to the railroad industry. Railroad walkway rules have been promulgated in California, Washington, Arizona, Nevada, and Oregon. Also, the Code of Federal Regulations ("CFR") Part 200, contains regulations regarding ballast.

### Respondents' Direct Cases

#### Canadian National Railroad

Respondent Canadian National Railroad's ("CN") first witness, Michael Oakley, a thirty year employee of CN, is employed in Edmonton, Alberta, Canada. He is responsible for remote control operations in Canada which have been in use in Canada since 1989. All CN major yards are equipped for remote control of locomotives whereby trainmen remain on the ground and switch locomotives using an operator control unit ("OCU") which is strapped to the body of the switchman. Mr. Oakley has seen no increase in injuries due to use of the OCU and does not consider it to be a hazard. Mr. Oakley does not see ballast as a danger issue. More dangerous are items which fall off railroad cars such as bearings, springs, and lumber.

On cross-examination, Mr. Oakley testified that there are fewer accidents with the use of the OCU. The OCU does not impede sight of the ground though Mr. Oakley concedes that a large abdomen could do so with or without the OCU. Mr. Oakley also did not agree that use of the OCU resulted in more walking.

Larry Anderson, a civil engineer employed by CN, testified that he is manager of track services. Mr. Anderson stated that the purposes of ballast are

1) distribution of load from the bottom of ties to the subgrade; 2) lock track into place, vertically, longitudinally, and laterally; and 3) provide drainage. It is a part of the track. Ballast used includes Number 2, Number 4, and Number 5, with Number 2 as the largest and most preferred. Granite ballast is now being used in CN yards. Planking, asphalt, and concrete all hold water on the track causing surface instabilities on the track. Smaller ballast is more comfortable for workers to walk on but more easily becomes muddy and clogged, reducing drainage and causing track instability.

Gary Neeble, employed by CN, testified that he is risk manager involved with property damage and injuries at Illinois Central Railroad Company ("IC"). When an employee is injured, a member of Mr. Neeble's staff accompanies the employee for a reenactment if the employee is able to do so. If unable to do so, the employee's supervisor or other co-worker is used to help determine the facts surrounding the accident. Recommendations are then made to the safety committee which is composed of management and labor. Safety audits are done as a committee. Mr. Neeble explained the resolution process used by the safety committee. Safety awards such as the Harriman Award are distributed in accordance with statistics sent to the Federal Railroad Administration ("FRA"). IC has won six gold medals and 3 silver medals. Norfolk Southern has also won many gold medals. Slip, trip, and fall incidents have declined every year since 2000. In 2000, seven of seventy-nine injuries involved slip, trip, and fall incidents due to ballast. In 2001, six of fifty-seven; in 2002, five of fifty-four, and in 2003 up to June, there has been one such incident. In 2000 of the seven incidents involving ballast, four occurred on a main line and three within a rail yard. In 2001, five incidents were on the main line and one in a yard. In 2002, there was one incident on the main line and four in a yard. The one incident in 2003 occurred on a main line.

On occasions when the safety committee has elected to replace larger ballast with smaller ballast, there has been no reduction in injuries but has resulted in drainage problems.

#### **Norfolk Southern Railroad Company**

Respondent Norfolk Southern Railroad Company ("NS") presented as its first witness, Don Browning, manager of safety reporting and analysis. Mr. Browning oversees the reporting of all personal injuries, grade crossing accidents, and train accidents to the FRA for NS. Mr. Browning was asked if FRA statistics revealed Illinois as the worst state in walkway caused injuries. Mr. Browning denied this and stated further that there is no category for supposedly walkway-caused injuries. It would not surprise Mr. Browning if Illinois had a higher reported number of various types of railroad injuries than other states due to the significant volume of traffic which travels through the Chicago area, a railroad hub.

Mr. Browning has examined FRA statistics and finds no correlation between reported injuries and walkway conditions. In the Chicago area, slip, trip, and fall incidents numbered one in 2000, zero in 2001, two in 2002, and zero in 2003. Worker population is approximately 330. In Decatur, with 160 employees, there were two slip, trip, and fall incidents in 2000, and none in 2001, 2002, or 2003. Of the total of seven, one was reported as ballast related. The others were due to trips over debris, switches, ties, or spikes. Mr. Browning is of the opinion that Petitioner's plan for improving safety by creating walkways could result in unsafe conditions. Mr. Browning is unaware of any improper reporting of accidents.

Joseph K. Lynch, Sr., a principal of Lynch Consulting Group, consulting engineers, testified to over fifty years of experience in the railroad industry. He is currently a chairman of the subcommittee of roadway and ballast. He has published numerous papers which concern ballast, drainage, and track stability. He directed the complete revision of ballast specifications for AREMA from 1983 to 1989. Mr. Lynch pointed out that AREMA recommendations are not the last word; they are guides. Recommendations may vary due to geology or geography and whether or not the railroad is a heavy main line or a short line railroad.

In regard to ballast, Mr. Lynch testified that walkways are part of the structure of the railroad track. The railroad bed is composed of the superstructure (ties and rails) and the substructure which supports the ties and rails. Ballast materials transmit loads through the ballast to the sub-ballast to the sub-grade. Its most important function is drainage. Water causes track support to soften, losing top rail geometry. Lack of drainage will not meet FRA standards. (Please see Attachments A and B, admitted into evidence in this proceeding as Norfolk Southern's Exhibits 5 and 5A.)

Mr. Lynch continued that large ballast provides more drainage because of more void space to drain water down from the track system. Sub-ballast is a compacted surface with a crown from the center of each side to the center of the track to drain water to the side ditches.

Petitioner's proposal to construct walkways on each side of the track on top of sub-ballast will retard, restrict, and eventually dam up the drainage of the water resulting in muddy work areas, a wet support system which will destroy the support system of the track resulting in derailment.

Freezing and thawing beget heaving which forces up the ties and creates variations in the track. Equipment also impacts the material of the proposed walkway. By walking or pulling equipment on the walkway, the ballast is compacted creating drainage problems and resulting in the slip, trip, and fall incidents everyone wishes to avoid. The ballast is also moved and does not

remain static. Walkways would prove to be unsafe and promote long-term deterioration of the ballast section.

On cross-examination by Petitioner, an examination of Exhibit 18, Part AIV, it is found that under Other Standards, the walkway is to be kept "reasonably" free of spilled fuel, oil, sand, post, and rocks. Mr. Lynch could not accept that the ballast be reasonably free of rocks since that is what ballast is made of. Mr. Lynch was unaware of the approval of walkway rules in certain states. Mr. Lynch considered the use of "reasonably" and "de minimus" as vague terms for use in deciding standards for ballast and was unaware that California, Oregon, Washington, and Oregon had adopted rules using such terminology. Mr. Lynch was also dissatisfied with the use of the phrase "crushed material" since no definition of "material" was provided.

Cross-examination by the SAAG made it clear that the proposed walkway would be on an even level with the sub-ballast and that there are now no walkways.

Under cross-examination by Mr. Stead, Mr. Lynch testified that he had made no cost estimates of the walkway but believed they would be expensive to maintain and prohibitively expensive to maintain.

James D. Gearhart, chief engineer of program maintenance for NS, testified that he is responsible for rail replacement, timber and surfacing, and rail grinding personnel (referred to as "gangs"). He also supervises ballast beam services. Mr. Gearhart confirmed the testimony of Mr. Lynch that walkways would function as part of the structure of the railroad track and that larger ballast provides more interlocking, stability, alignment over the track surface, and water drainage. He also testified that smaller ballast would cause a wet track structure which would result in a muddy walkway area. He stated that movement of people and equipment would make it impossible to have an exact area called a walkway. The walkway would be dynamic, not static, since ballast moves when it's wet, when it freezes and thaws, and when equipment and people move upon it. It has been Mr. Gearhart's experience that until recently, workers preferred the larger ballast since it lifted them above the dirt and mud.

Mr. Gearhart also discussed the transportation of ballast from yard to yard. It is impossible to completely clean the ballast cars. They hold one hundred tons and any car might have from one to five tons of ballast of a different size than that intended. Therefore, the term "de minimus" used in determining if the ballast is of uniform size is unhelpful. It is particularly unhelpful to those with an engineer's mind set who expect more exact enumeration.

On cross-examination by Petitioner, Mr. Gearhart was unaware that the Railroads had proposed use of the term "de minimus." He did not agree with the use of the term "reasonably free" since what one party considers reasonably

free may appear excessive to another. Mr. Gearhart has never railroaded in the western states which have adopted imprecise language in their walkway rules and is aware that geographic and geologic differences could make their rules inappropriate in Illinois.

### **Recall of Petitioner's Witness**

Mr. Szabo was recalled and questioned about the resolution process previously testified to by Mr. Neeble. Mr. Szabo is a member of the Safety Assurance Compliance Program ("SACP") and serves as designee for all United States operations. SACP is a joint labor-management program in which all work to address safety issues is done in partnership. Mr. Szabo testified that the resolution process has not been implemented as testified to by Mr. Neeble.

Re-cross-examination by Respondent Wisconsin Central Ltd. disclosed that there is a safety committee process in effect though it may vary by location and is not the safety resolution program previously testified to.

### **Analysis and Conclusions**

The issue in this matter is safety as seen from the different points of view of Petitioner and the Railroads. Petitioner alleges the inappropriate use of larger ballast is hazardous to the workers and that that hazard has resulted in Illinois being the worst or second worst state in the nation for slip, trip, and fall accidents. Petitioner also alleges that the proposed use of remote control devices will increase the amount of walking necessary and lead to more slip, trip, and fall accidents. Canadian National's witnesses, who have had the most experience with OCUs, testified that there is no increase in miles walked and no impediment to sight as the workers move through the yard wearing the OCUs. Witnesses opposing the petition, whose testimony is summarized above, stress the interconnectedness of track support systems and the proposed walkways and testify that track support systems will be endangered by alterations to the ballast system now in place.

In regard to Illinois' stature as worst in safety, Illinois is second in employee injuries per 1,000 mile of railroad route due in part to its position as number two in track mileage. When the data are normalized, Illinois is number seventeen, not two. In addition, there is testimony that FRA statistics do not contain a category for supposedly walkway injuries and that more injuries are caused by railway-related debris in the railyards.

To improve the situation, it is Petitioner's position that walkways should be constructed of smaller ballast. Opposing testimony is convincing that smaller ballast will destroy the support system of the track, possibly causing derailment. Petitioner's *raison d'être* for this action is the safety of the workers. The opposition takes its stand in favor of track safety.



The most experienced expert witness on ballast, Mr. Lynch, does not see a necessity for walkways. Considering the interaction of the track structure and the proposed walkway, a convincing case has not been made that a two-foot walkway will remain in place and provide safe walking for the railroad workers. An additional hazard is the deterioration of the track structure caused by construction of what will of necessity be temporary walkways and which will not conform to FRA standards for track support.

For the reasons stated above, the Commission is of the opinion that the construction of walkways is not in the best interest of railroad safety and that the perilous safety situation of the railroad workers has been overstated. The petition should be denied.

IT IS THEREFORE ORDERED that the petition filed by United Transportation Union-Illinois State Legislative Board on February 18, 2003, be, and the same is hereby, denied.

IT IS FURTHER ORDERED that in accordance with Chapter 625 ILCS 5/18c-2201 and 5/18c-2206 of the Illinois Commercial Transportation Law, this is a final order subject to the Administrative Review Law.

By Order of the Commission this day of 2004.

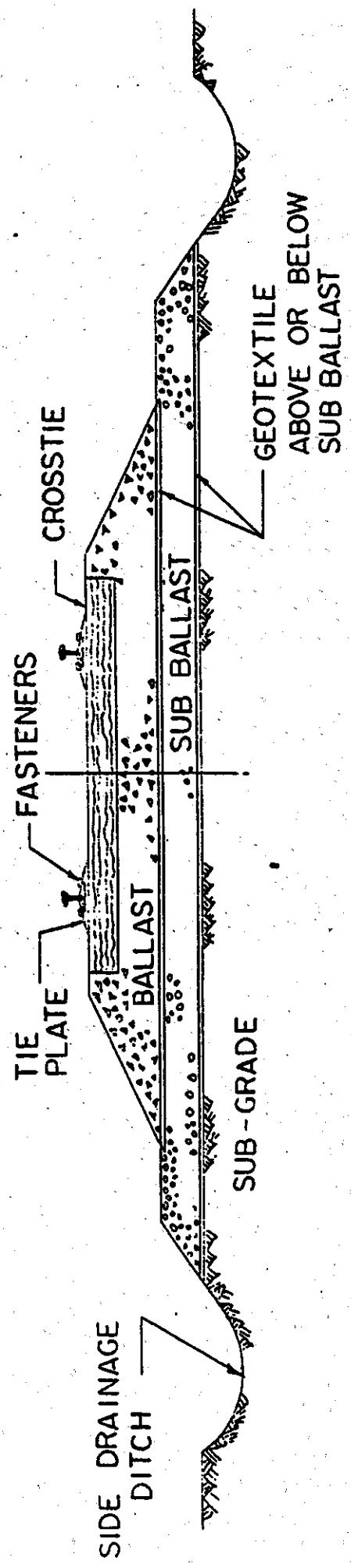
Chairman

OFFICIAL FILE

I.C.C. DOCKET NO. 103-0015  
NS Exhibit No. 5  
Witness Lynch  
Date 10-2-83 Reporter TR

NOTES

1. Depth of Ballast & Sub-ballast section will be determined by individual railroad conditions and/or track location.
2. Section for use with jointed or continuous welded rail.
3. Shoulder width is determined by type of tie, speed, traffic and loading conditions.



TYPICAL RAILROAD TRACK STRUCTURE

CROSS SECTION

NS Exh. 5

RPI  
DRWG. No. 1  
MAY 15, 1986

# NOTES

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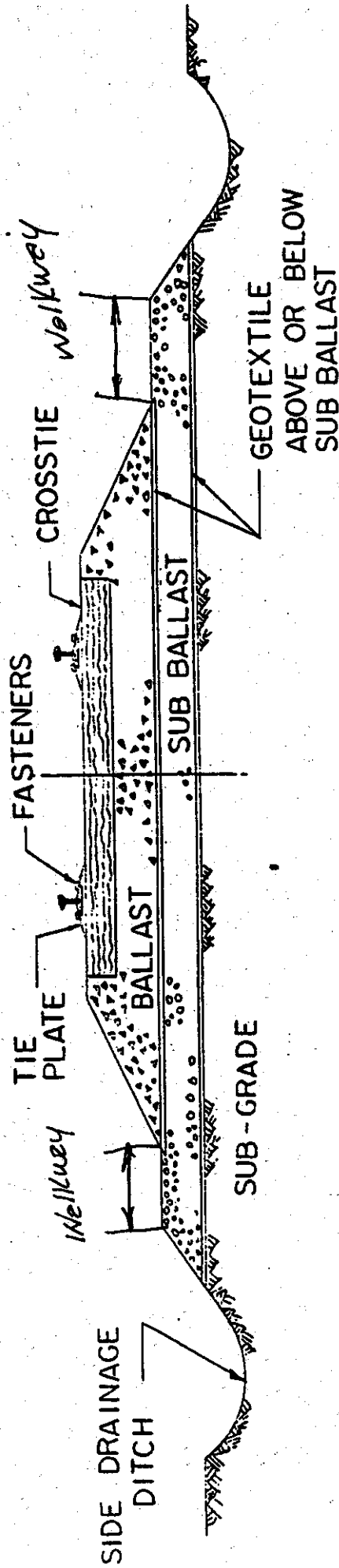
## OFFICIAL FILE

I.C.C. DOCKET NO. T03-0015

NS Exhibit No. 5A

Witness [Signature]

Date 10/20/03 Reporter KK



TYPICAL RAILROAD TRACK STRUCTURE

CROSS SECTION

[NS Exh. 5]

RPI  
DRWG. No. 1  
MAY 15 1986